

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re Case Nos. 02-55527-JRG and
02-55528-JRG
SAN JOSE MEDICAL MANAGEMENT,
INC., a California Corporation,
and affiliated Chapter 11 cases,
Chapter 11
Debtors.

ORDER ON THIRD AND FINAL FEE
APPLICATION OF FOLEY & LARDNER LLP

I. INTRODUCTION

Foley & Lardner LLP's employment as counsel for the debtors was approved by the court on December 30, 2002, and made effective as of September 30, 2002. The court ordered the audit of Foley's fees on December 9, 2004. Having reviewed the audit report, comments, as well as the objections to fees, the request for final approval of fees and expenses is granted in part and denied in part as herein stated.

II. BACKGROUND

The debtors filed bankruptcy on September 30, 2002. There were several major issues with respect to the reorganization of the debtors that came before the court. The court dealt with issues involving a

1 collective bargaining agreement, executory contracts, and personal and
2 real property leases. The plan of reorganization was confirmed on August
3 31, 2004, with an effective date of September 27, 2004.

4 **III. FEES**

5 Prior to submission of the third and final fee application, the court
6 approved on an interim basis Foley's first fee application for the period
7 from September 30, 2002 through December 15, 2002, in the amount of
8 \$260,828.50 in fees and \$13,061.09 in expenses. The award included a
9 \$30,000.00 reduction in fees as agreed to between the United States
10 Trustee (UST) and Foley.

11 On the second interim fee application for the period from December
12 16, 2002 through April 30, 2003, the court received objections from the
13 UST and the creditors' committee. The objections expressed concern that
14 the fees had reached almost \$600,000.00, and no plan and disclosure
15 statement was on file. In addition, the UST asserted that the
16 descriptions of activities were vague. The court approved Foley's second
17 fee application on an interim basis in the amount of \$314,581.00 in fees
18 and \$16,115.80 in expenses, subject to a \$100,000.00 holdback.

19 In its final application, Foley seeks approval for fees and expenses
20 incurred during the third interim application period from May 1, 2003
21 through September 26, 2004, in the amount of \$910,416.50 in fees and
22 \$16,395.61 in expenses. Foley also sought approval of total fees in a the
23 final amount of \$1,485,826.00 (which included the previous \$100,000.00
24 holdback), and total expenses of \$45,572.50.

25 On receipt of the third and final fee application, the court received
26 an objection from the UST. The UST stated that the debtors' CEO had
27 expressed concern about the amount of fees incurred by counsel. The CEO
28 advised the UST that he had not received any invoices from Foley since

1 April 2004, and that he had no idea of the magnitude of the total
2 requested fees until served with the application. He stated that he
3 wanted to file a detailed objection to the application and asked the UST
4 to seek a continuance of the hearing on the fee application.¹

5 In addition, creditor Sobrato Group expressed concern that the amount
6 of fees requested in the billing categories for "Plan of Reorganization
7 and Trust Agreement" and "Disclosure Statement," which total \$455,830.00,
8 appeared to require further breakdown. Sobrato believed more detail was
9 required given the debtors' assertion that it was the committee's
10 counsel's actions that caused the fees to be inflated.

11 At the hearing on the third and final fee application on December 1,
12 2004, the court approved the fees and expenses sought for the third
13 interim period with a 20% holdback. The court also ordered an audit of
14 the fees.

15 The audit report was submitted to the court on March 18, 2005. The
16 court gave interested parties an opportunity to respond to the audit. The
17 court received a supplemental objection from the UST, who set forth
18 explicit categories of fees believed to be excessive and specific
19 examples of actions by debtors' counsel that the UST categorized as
20 unnecessary and inefficient.

21 The court also received a response from Foley, which sought to
22 clarify and explain aspects of the audit report. Foley has pointed out
23 instances in which entries were included in the \$30,000.00 aggregate
24 reduction in fees agreed to as part of the approval on the first interim
25 application.

26 From the outset, Foley agrees to reduce its fees in the amount of

27
28 ¹The court did add the CEO to the mailing list for the audit. However, the court did not receive any written response from the CEO with respect to the audit of the fees.

1 \$14,695.75. This amount includes the following:

- 2 • \$0.50 for a billing discrepancy reflected on Exhibit A² – Foley
3 explains that the other entry on Exhibit A in the amount of
\$320.00, was included in the \$30,000.00 aggregate reduction;
- 4 • \$1,333.00 for fees which were identified on Exhibit B as no
5 charge items but were charged in error – Foley explains that an
6 entry in the amount of \$86.00 included on Exhibit B was already
7 included in the \$30,000.00 aggregate reduction;
- 8 • \$645.00 entry of Andrea Porter from August 9, 2004, which is
9 described as a data entry or scrivener's error; [See Exhibit D-
2];
- 10 • \$690.00 entry of Jeffrey Butwinick from March 22, 2003, due to
11 an insufficient description [See Exhibit D-2];
- 12 • \$7,079.75 in fees identified on the audit report as
13 "Administrative/Clerical Activities by Paraprofessionals,"
14 "Administrative/Clerical Activities by Professionals,"
15 "Organize/Update Client Files," and "Photocopying" – Foley
16 explains that \$6,730.50 in entries appearing in these
17 categories were included in the \$30,000.00 aggregate reduction
18 [See Exhibit I-1, I-2, I-3, I-4];
- 19 • \$3,484.50 for entries on Exhibit L related to timekeepers who
20 billed 10.00 hours or less – Foley states that \$1,471.00 in
21 entries on Exhibit L had already been factored into the
22 \$30,000.00 aggregate reduction; and
- 23 • \$1,463.00 spent in discussions with the UST regarding language
24 in the plan – the UST's objection included a description of a
25 series of phone calls and e-mails, which the UST believed were
26 handled inefficiently.

19 In relation to the remaining fees, the court has a duty to review
20 each request and determine whether the requirements of Bankruptcy Code §
21 330 are met. In re Busy Beaver Bldg. Ctrs., Inc., 19 F.3d 833, 840-45 (3rd
22 Cir. 1994); In re Berg, 268 B.R. 250, 257 (Bankr. D. Mont. 2001). Section
23 330 of the Bankruptcy Code provides that the court may award to a
24 professional person employed under §§ 327 or 1103 reasonable compensation
25 for actual, necessary services rendered and reimbursement of actual,
26

27 ² Unless otherwise noted, all references to exhibits are to the exhibits that appear in
28 the "Review and Analysis of Final Fee Application Submitted by Foley & Lardner LLP," which was
filed with the court on March 18, 2005.

1 necessary expenses. In determining the amount of reasonable compensation,
2 the court considers the nature, the extent, and the value of such
3 services, taking into account all relevant factors. 11 U.S.C. §
4 330(a)(3).

5 In reviewing the audit report and objections received, the court
6 concludes the following.

7 **A. Fees related to the plan and disclosure statement will be**
8 **reduced.**

9 As set forth in the third and final fee application, the total fees
10 spent on the plan and disclosure statement total \$455,830.00. The
11 final fee application narrative states that disputes with the committee
12 added to the expense in these categories.³

13 However, on closer look the court believes much of the fees incurred
14 are not reasonable given the circumstances of the case. According to the
15 final fee application, the fees related to the disclosure statement
16 involve nine separate timekeepers and the fees related to the plan and
17 trust agreement involved eight separate timekeepers. No explanation is
18 given for so many timekeepers being involved.

19 The court notes that in these categories more than one-half of the
20 fee entries, \$234,785.00, are attributed to one associate. The court is
21 particularly troubled by this fact when it looks at specific categories
22 of entries related to the plan and disclosure statement.

23 The court had the auditor take the entries related to the plan and
24 disclosure statement and organize them into particular categories. [See
25 Exhibit T.] The audit sets forth that \$299,392.73 was spent on drafting
26 and revising the plan. [See Exhibit T-2.] Of this amount, \$182,957.58 in

27 ³The committee counsel's fees that are related to the plan and disclosure statement total
28 \$97,573.00. As it stands, the debtors' counsel's fees are almost five time those of the
committee for services related to the plan and disclosure statement.

1 entries are associated with this one associate.

2 The court finds this unreasonable under the circumstances given that
3 another five professionals had time entries related to drafting and
4 revising the plan that totaled an additional \$116,435.15. In addition,
5 professionals with much more experience billed less time. It appears to
6 the court that the plan and disclosure statement were a training exercise
7 for less experienced associates and the estate should not bear the cost
8 of this exercise. The court can find no reason that it was necessary to
9 have six professionals involved in the drafting and revisions of the plan,
10 and why one associate's fees, who was not even lead counsel, would make
11 up almost one-half this amount. Thus, the court will reduce the fees on
12 Exhibit T-2 by 50% because the court concludes that the amount of time is
13 not reasonable and was the result of training, inefficiencies and
14 overstaffing in the case. The court denies \$149,696.37 in fees.

15 Another area of concern regarding the plan and disclosure statement
16 has to do with negotiations between the debtors' counsel and committee's
17 counsel on the plan and disclosure statement. It is undisputed that
18 negotiations between the debtors and the committee on the plan and
19 disclosure statement were protracted. Under the plan, a trust was created
20 to oversee its implementation. Prior to confirmation, a dispute arose
21 between the debtors and the committee over the composition of the trust
22 board. One reason for the dispute was the committee's proposal that a
23 PacifiCare representative be a member of the board. The debtors stated
24 that for business reasons it did not want a representative of PacifiCare
25 on the board. In addition, an issue arose over which constituency would
26 have control over the trust board that was to be comprised of three
27 members, in addition to the plan trustee.

28 By the time of the first hearing on the confirmation of the plan, the

1 debtors and the committee appeared to be at an impasse over who would
2 serve on the board and whose constituents would control the board. The
3 issue was resolved when the parties accepted the court's proposal that the
4 trust board would be comprised of two representatives for the debtors and
5 two representatives for the unsecured creditors. Final decision making
6 authority would lie with the plan trustee.

7 However, the court had noted at the first confirmation hearing that
8 the impasse over the trust board was in part lawyer created, with both
9 sides unwilling to compromise and seek a solution. The court concludes
10 that this contributed to the overall cost of the plan and disclosure
11 statement. Thus, a 10% general reduction in fees related to the plan and
12 disclosure statement is warranted. As a result, and taking into account
13 the prior reduction related to drafting and revising the plan, the court
14 denies \$30,613.36 in fees.

15 **B. A review of intra-office conferences and outside hearings and**
16 **conferences attended by more than one professional will result**
in a reduction in fees.

17 The audit report identifies \$135,962.58 in fees that are related to
18 intra-office conferences. [See Exhibit F-1.] In addition, \$56,340.42 in
19 fees are identified for situations in which more than one professional
20 billed. [See Exhibit F-1.] As for outside conferences and hearings,
21 \$61,557.75 in fees are identified, and of this amount, \$39,626.50 in
22 entries are identified as involving more than one professional billing.
23 [See Exhibit G.]

24 The Bankruptcy Court for the Northern District of California
25 maintains Guidelines for Compensation of Professionals.⁴ Guidelines 15
26 and 16 provide:

27 ⁴ The District's Guidelines for Compensation and Expense Reimbursement of Professionals
28 and Trustees are available on the District's Web site at <http://www.canb.uscourts.gov>.

1 15. **Conferences** - Professionals should be prepared to explain time
2 spent in conferences with other professionals or
3 paraprofessionals in the same firm. Failure to justify this
4 time may result in disallowance of all fees related to such
5 conferences.

6 16. **Multiple Professionals** - Professionals should be prepared to
7 explain the need for more than one professional or para-
8 professional from the same firm at the same court hearing,
9 deposition or meeting. Failure to justify this time may result
10 in compensation for only the person with the lowest billing
11 rate.

12 In a complex case such as this one, no single professional is going
13 to possess all of the skills to accomplish the necessary tasks. The estate
14 is better served where multiple professionals with the required expertise
15 are utilized. In these circumstances, some communication is required.

16 However, in reviewing the fees, the audit report highlights that
17 there were twenty-eight timekeepers involved in this case, including three
18 senior partners, five partners, one of counsel, one special counsel, eight
19 associates, three paralegals, three interns, one law clerk, two case
20 clerks, and one timekeeper whose position was not identified. [See Exhibit
21 J.] However, three partners, one associate, one law clerk, and the
22 unknown timekeeper were not billed to the estate. [See Exhibit J.] In
23 addition, Foley has agreed to deduct the fees on timekeepers who billed
24 less than 10 hours on the case.

25 The effect of this high staffing level can be seen when the billing
26 entries for intra-office conferences are reviewed. In this category,
27 twenty-one timekeepers are involved, of which four are timekeepers who
28 billed less than 10 hours. Taking this into account, this leaves
29 seventeen timekeepers and \$135,063.33 in fees attributed to intra-office
30 conferences.

31 The court concludes that the excessive level of staffing in the case
32 contributed to the number of entries for intra-office conferences. It

1 also appears that on a certain level the estate is being asked to train
2 junior professionals.

3 This concern led to the general rule that no more than one
4 professional may charge the estate for intra-office conferences and
5 meetings absent an adequate explanation. In re Bennett Funding Group,
6 Inc., 213 B.R. 234, 245 (Bankr. N.D.N.Y. 1997); In re A.A.D.C., Inc., 193
7 B.R. 448, 450-51 (Bankr. N.D. Ohio 1996); In re Poseidon Pools of America,
8 Inc., 180 B.R. at 718, 731 (Bankr. E.D.N.Y. 1995).

9 Foley provides no explanation concerning the necessity of intra-
10 office conferencing and the entries in which more than one attorney
11 billed. As discussed above, the court finds the number of intra-office
12 conferences to be unreasonable, even if billed by only one attorney. For
13 that reason, the court will reduce by 25% the \$135,063.33 in intra-office
14 conference fees that are highlighted on the audit report. This results
15 in a reduction of \$33,765.83.

16 As for outside hearings and conferences, Foley states that the
17 entries on Exhibit G represent situations where the participation of the
18 additional attorney was necessary and appropriate in order to effectively
19 and efficiently represent the debtors. The court has reviewed the
20 entries.

21 The court finds the explanation to be inadequate given this review.
22 Instances exist where three to four Foley attorneys "attend" a telephonic
23 hearing [See Exhibit G, entries of 10/30/02 (Beatty, Butwinick, Porter);
24 11/14/02 (Beatty, Butwinick, Hwang, Porter); 12/3/02 (Beatty, Butwinick,
25 Hwang, Porter); 5/21/03 (Butwinick, Hwang, Lavender).]

26 There also are situations in which three to four attorneys would be
27 involved on the same day in the same matter. For example, on May 21,
28 2003, Mr. Beatty was involved and billed for two telephone conversations

1 with an attorney from Heller Financial regarding cash collateral. On the
2 same day, Mr. Butwinick billed for a telephone conversations with counsel
3 from the creditors' committee and a telephone conversation with counsel
4 from Heller. Mr. Lavender was also involved in a teleconference with
5 committee counsel and Heller's counsel. Finally, Ms. Porter had a
6 telephone conversation with the debtors' CEO and committee counsel
7 regarding cash collateral. [See Exhibit G.] No explanation is provided
8 to support what special expertise these four professionals, whose fees
9 ranged from \$280 per hour to \$430 per hour, hold so as to justify so many
10 timekeepers billing on the same matter.

11 The court concludes that a reduction of fees is warranted because
12 debtors' counsel has not adequately explained how each attorney
13 contributed to the hearing or conference in a meaningful way. Thus, the
14 court will reduce by 25% the \$39,626.50 in fees highlighted on the report
15 as involving more than one professional billing. This results in a
16 reduction of \$9,906.63.

17 /////

18 **C. Clumped entries have been adequately explained.**

19 The audit report highlights \$213,460.50 in fees that are clumped
20 billing entries. [See Exhibit E.] Under Guideline 14, "If a number of
21 separate tasks are performed on a single day, the fee application
22 should disclose the time spent for each such task (i.e., no
23 "grouping" or "clumping")."

24 "Courts have refused repeatedly to approve unitemized
25 disbursements for services that are lumped together in a single
26 entry, because such action inhibits the court from estimating the
27 reasonableness of the individual services and their value to the
28 debtor's estate." In re Ward, 190 B.R. 242, 246 (Bankr. D. Md.

1 1995); In re Poseidon Pools of America, Inc., 180 B.R. at 731.

2 In its response, Foley points out that of these entries,
3 \$6,337.50 are already the subject of prior agreed-to fee
4 reductions. For the remaining entries, Foley has provided the
5 court with supplemental billing entries that provided the time
6 spent for each task. The court is satisfied with the separation
7 of the entries to reflect the amount of time spent on each task.
8 Thus, the court will not reduce fees based on clumping.

9 **D. Fees sought to review/revise "open items" will be disallowed.**

10 The audit report identifies \$10,169.50 in entries that include
11 descriptions related to "open items." [See Exhibit I-5.] Foley states in
12 its response that these items are related to counsel looking at unresolved
13 issues and developing a plan to resolve them. However, the court finds
14 the descriptions in the time entries to be inadequate. In looking at
15 fees, the court must be able to evaluate the complexity and necessity of
16 work done on behalf of the estate in order to determine appropriate
17 compensation. In re Poseidon Pools of America, Inc., 180 B.R. at 729-31.

18
19 The court finds that entries with respect to "open items" involve
20 vague characterizations of the services performed. The court denies
21 \$10,169.50 in fees for entries on Exhibit I-5, due to inadequate
22 descriptions of the services rendered.

23 **E. The court reduces fees sought for "interns."**

24 The audit identifies \$9,887.00 in fees that are attributed to
25 "interns." [See Exhibit J-1]. The final fee application also identifies
26 these three individuals as "interns." The description of the individuals'
27 qualifications are that one is a law school graduate awaiting bar exam
28 results and the other two are second-year law students. One of the

1 second-year law students is identified as working in Foley's Milwaukee,
2 Wisconsin office as a summer associate. Guideline 5 provides:

- 3 5. **Paraprofessionals**—Fees may be sought for paralegals,
4 professional assistants and law clerks only if identified as
such and if the following requirements are met:
- 5 (a) The services for which compensation is sought would have had to
6 be done by the professional if not done by the
7 paraprofessional, and would have been compensable under these
guidelines;
- 8 (b) The person who performed the services is specially trained or
is a law school student, and is not primarily a secretary or
9 clerical worker; and
- 10 (c) The application includes a resume or summary of the
paraprofessional's qualifications.

11 One intern's primary work involved the third and final fee
12 application. Along with this intern, six other attorneys and one
13 paraprofessional were involved. In reviewing the intern's fees, the court
14 finds that many entries are for the intern to familiarize himself about
15 the case, the court's guidelines, prior fee applications, and to
16 proofread. Thus, of the \$3,526 in fees sought, the court will disallow
17 \$1,655.50 in fees.⁵

18 The intern in Milwaukee, Wisconsin is identified in the third and
19 final fee application as providing services under category B310 - Claims
20 Administration and Objections. The specific reference to this intern is
21 that she performed legal research and prepared a memo related to lease
22 rejection claims and damages. The total fees attributed in the fee

23
24 ⁵ The fees denied include the following entries for Wong on Exhibit S-1: 9/14/04 (all
25 entries); 9/15/04 (all entries); 9/16/04 (.10 - Discuss with J. Butwinick regarding hardcopy
26 of 1st and 2nd fee application orders to determine amount withheld); 9/16/04 (0.50 - Review
27 previous fee application to determine if outstanding issues from previous fee application
28 should be discussed in the 3rd and final fee application); 9/20/04 (0.10 - Review withheld fees
from 1st and 2nd fee applications); 9/24/04 (0.60 - Draft language of preference and avoidance
statute of limitations to the fee application); 9/24/04 (0.10 - Analyze adding preference and
avoidance statute of limitations language in the fee application); 9/24/04 (0.70 - Proofread
third and final fee application (30 pages)); 9/24/04 (0.50 - Proofread fee application before
final edit).

1 application to this intern is \$2,686.00. The court will deny the fees
2 because the court finds that the described activity is too vague to
3 justify the expense of a lease rejection memorandum.

4 The third intern's fee entries appear in the third and final fee
5 application under category B321 - Disclosure Statement (including Business
6 Plan). The narrative includes no description of the services the intern
7 provided. A review of the fee entries disclosed twenty-two entries that
8 contained the basic description: "worked with J. Hwang on organizing,
9 reviewing, and responding to inquiries re: notice of disclosure statement
10 hearing."⁶ The one other entry is in reference to a meeting with Foley
11 counsel, Mr. Hwang and Ms. Porter, to discuss "disclosure statement fee
12 application hearing."⁷ The court will deny the fees for these entries as
13 the descriptions of the services do not provide any indication that the
14 activities performed were necessary and reasonable. Thus, the court
15 denies the \$3,675.00 in fees of this intern.

16 In total, the court will deny \$8,016.50 in fees that are associated
17 with interns.

18 **F. Fees related to Charles Vold litigation are not reasonable**
19 **under the circumstances.**

20 In November 2002, a creditor, Oncology Therapeutics Network Joint
21 Venture, L.P. (OTN), instituted litigation in state court against the
22 debtors' former CFO Charles Vold based on an alleged personal guarantee
23 in a credit application Vold signed as CFO. Vold filed a cross-claim
24

25 ⁶These entries appear on the time records under category B321 and appear as entries for
26 DH dated: 6/1/04; 6/2/04; 6/3/04; 6/4/04; 6/7/04; 6/8/04; 6/10/04; 6/11/04; 6/15/04; 6/16/04;
27 6/17/04; 6/18/04; 6/21/04; 6/22/04; 6/23/04; 6/29/04; 6/30/04; 7/1/04; 7/12/04; 7/14/04;
28 7/19/04; 8/2/04.

⁷This entry appears on the time records under category B321 as an entry for DH dated
6/11/04.

1 against the debtors seeking indemnity for any liability he might i

2 The debtors removed the lawsuit to the bankruptcy court. OTN brought
3 two motions to remand the matter back to the state court and both motions
4 were denied. The litigation proceeded between OTN and Vold. Eventually
5 a final judgment was entered in Vold's favor after he successfully brought
6 a summary judgment motion.

7 Foley seeks \$25,506.00 in fees to basically monitor the Vold
8 litigation. The court has reviewed the time records involved in this
9 billing category. The court notes that this category of fees involved
10 five separate timekeepers. The court questions the level of staffing and
11 professional involvement. In considering the circumstances under which
12 debtors' counsel was required to remove the matter, participate in two
13 motions to remand, file an answer to the cross-complaint, and generally
14 monitor the litigation, the court finds the fees sought to be excessive.
15 The court takes into account that Vold's counsel, who took the lead in
16 bringing and arguing a summary judgment motion that involved a very
17 difficult legal question, recovered \$25,550.00 in attorney's fees for the
18 entire matter.

19 Thus, the court finds the fees Foley seeks in this category to be
20 excessive and will reduce them to \$7,500.00, denying \$18,006.00 in fees.

21
22 **G. Further reduction in fees sought for union and collective
bargaining matters is warranted under the circumstances.**

23 The UST has had a continuing objection to the amount of fees
24 spent with respect to the union and collective bargaining
25 agreement. [See Exhibit P.] The UST asserts that Foley has never
26 explained what it accomplished to justify its fees in this
27 category.

1 In its response, Foley states that this category of fees has
2 already been reduced by \$19,683.50 as part of the \$30,000 aggregate
3 reduction in fees and asks that the court allow its fees in the
4 amount of \$125,859.00 for its work in this category. In addition,
5 Foley asserts that the detailed history of the dispute with the
6 union is set forth in the disclosure statement. According to
7 Foley, its union negotiations were essential to the reorganization
8 effort and achieved significant savings for the estate.

9 The court finds Foley's response to be a generic explanation.
10 In addition, after reviewing the disclosure statement it is unclear
11 which results were due to Foley's services with respect to the
12 union and which were due to special counsel who was later hired to
13 handle labor issues. Foley also has provided an inadequate
14 explanation of its staffing level on this issue. For this category
15 of fees, nine timekeepers billed for their time, which included
16 lead counsel on the case, two senior partners (one of whom has
17 extensive experience in labor issues), one partner, four
18 associates, and one paralegal. The court concludes that this
19 category of fees is another situation in which debtors' counsel was
20 unreasonably overstaffing its participation in the union matter.
21 Thus, the court will further reduce this category of fees by 35%,
22 or \$44,050.65.

23 **H. Fees for amending schedules and the statement of**
24 **financial affairs are denied.**

25 The UST also objects to the fees related to the filing of
26 schedules and amended schedules. According to the UST, at the very
27 outset of the case the Clerk's Office refused to file the first
28 draft of the debtors' schedules and statement of financial affairs

1 because they were in poor condition. A second draft was filed on
2 October 22, 2002, and amended schedules were filed on December 4,
3 2002, to correct errors. The UST asserts that this demonstrates
4 that debtors' counsel did not have a good handle on the debtors'
5 assets and liabilities during the first 60 days of the case.

6 Foley responds that the debtors' prior CFO had represented
7 that he had extensive experience in chapter 11 proceedings and he
8 was solely responsible for the preparation of the debtors'
9 schedules and statements of financial affairs. Foley admits that
10 it initially relied on the CFO's professed expertise and when this
11 reliance was shown to be misplaced, it took action to correct the
12 matter.

13 In reviewing the time entries related to amending the
14 schedules and statement of financial affairs, the court notes that
15 \$23,469.00 in fees were incurred from November 18, 2002 through
16 December 4, 2002. The estate should not bear the cost of counsel's
17 misplaced reliance on the debtors' CFO. Experienced bankruptcy
18 counsel ensures from the outset that the schedules and statement
19 of financial affairs are complete and properly presented for
20 filing. The court does not accept as a reasonable explanation that
21 it was the debtors' fault that the schedules and statement of
22 financial affairs were not properly completed. Thus, the court
23 will deny \$23,469.00 in fees that are related to amending the
24 schedules and statement of financial affairs.

25 **I. Fees for the retention and compensation of professionals**
26 **will be reduced.**

27 The report highlights that with respect to Foley's retention
28 and compensation, \$95,880.50 in fees were incurred. [See Exhibit

1 S-1.] Taking into account the portion of fees previously denied for
2 one timekeeper, these fees total \$94,225.00. The UST has asserted
3 that this amount of fees exceeds the 5% amount mandated in the
4 guidelines. The UST also objects that \$7,473.00 in fees were
5 expended to respond to objections to Foley's second interim fee
6 application.

7 Foley responds that fees and costs incurred during the defense
8 of a fee application are compensable. In re Smith, 317 F.3d 918
9 (9th Cir. 2002). However, the response provides a narrative that
10 does not address the reason this amount of fees was incurred in
11 dealing with retention and compensation. Instead Foley recounts
12 interactions with the UST concerning fee applications. In
13 addition, the court has been unable to locate any pleadings filed
14 by Foley in response to the objections to their second fee
15 application.

16 With respect to fee applications, Bankruptcy Code § 330
17 contemplates compensation for the preparation of fee applications.
18 11 U.S.C. §330(a)(6); In re Smith, 317 F.3d 918, 927-28 (9th Cir.
19 2002). As with all compensation requested, the court must
20 determine an amount that is reasonable. Some courts have utilized
21 a benchmark such as 5%. In re Bass, 227 B.R. 103, 109 (Bankr. E.D.
22 Mich 1998); In re Spanjer Bros., Inc., 203 B.R. 85, 93 (Bankr. N.D.
23 Ill. 1996). Such benchmarks are helpful but the circumstances of
24 each case should control.

25 In addition, the court's Guideline 6 provides:

- 26 6. **Preparation of Application** - Reasonable fees for
27 preparation of a fee application may be requested. Fees
28 for preparation of a fee application may not exceed five
percent of the total amount of fees and costs requested
in the application. This five percent guideline is a

1 ceiling rather than a floor; preparation expenses
2 equaling five percent are not presumptively reasonable.
3 The aggregate number of hours spent, the amount requested
4 and the percentage of the total request which the amount
5 represents must be disclosed. If the actual time spent
6 will be reflected and charged in a future fee
7 application, this fact should be stated but an estimate
8 nevertheless provided.

9 Once again the court is concerned that the number of
10 professionals involved in this category of fees is part of the
11 reason the fees incurred are not reasonable in relation to the
12 case. In looking at the audit report, at least four attorneys
13 contributed a significant amount of time to the fee applications,
14 with a total of nine timekeepers billing in this category.

15 Given the circumstances of the case and the amount of fee
16 reductions discussed above, the court concludes that \$55,500.00
17 will provide debtors' counsel with reasonable compensation with
18 respect to this category of fees. Thus, the court will deny
19 \$38,725.00 in fees related to this category of fees.

20 **J. All other fees requested are approved.**

21 The court has reviewed the remaining fee categories outlined
22 in the audit report and concludes that no further reductions are
23 warranted. The court denies a total of \$381,114.59 in requested
24 fees.

25 **IV. Expenses**

26 As for expenses, debtors' counsel seeks reimbursement for
27 \$45,572.50 in expenses. From the outset, Foley agrees to the
28 following reductions:

- \$474.52 in travel expenses for which counsel has not indicated the amount attributed to parking and the amount attributed to mileage [See Exhibit AA];

- 1 • \$740.80 in office overhead [See Exhibit U]; and
- 2 • \$146.62 for an overseas cell phone charges included in
- 3 error. [Exhibit BB.]

4 The court will reduce expenses by an additional \$239.07. This
5 amount is comprised of an entry for a travel meal in the amount of
6 \$31.17 described as: "J. Butwinick meal during trip to San Jose,
7 CA 11/14/02 - Vendor: Jeffrey H. Butwinick." No explanation is
8 given for why the cost comports with the guidelines.

9 The other amount is \$207.90 for an entry described as: "J.
10 Butwinick Travel to San Jose, CA to meet with client (Lodging
11 \$207.90) 11/14-11/15/2002) - Vendor: Jeffrey H. Butwinick." [See
12 Exhibit AA.] No reason is given for the need to incur this San Jose
13 lodging expense when counsel is located in San Francisco.

14 Total expenses will be reduced by \$1,601.01.

15 V. CONCLUSION

16 The court approves on a final basis fees in the amount of
17 \$1,104,711.41, having denied \$381,114.59 in fees. Expense
18 reimbursement is approved in the amount of \$43,971.49, the court
19 having denied \$1,601.01 in expenses. Total fees and expenses
20 approved on a final basis are \$1,148,682.90. All fees and expenses
21 that are denied are done so on a final basis. The holdbacks are
22 released, however any fees and expenses debtors' counsel has
23 received in excess of those approved herein are to be returned to
24 the reorganized debtor.

25 DATED: _____

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28 JAMES R. GRUBE
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT

For The Northern District Of California

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Case No. 02-55527-JRG
02-55528-JRG

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CERTIFICATE OF SERVICE

I, the undersigned, a regularly appointed and qualified Judicial Assistant in the office of the Bankruptcy Judges of the United States Bankruptcy Court for the Northern District of California, San Jose, California hereby certify:

That I, in the performance of my duties as such Judicial Assistant, served a copy of the Court's: ORDER ON THIRD AND FINAL FEE APPLICATION OF FOLEY & LARDNER LLP by placing it in the United States Mail, First Class, postage prepaid, at San Jose, California on the date shown below, in a sealed envelope addressed as listed below.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on _____ at San Jose, California.

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